NO. 22, 338

ited States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CONTINENTAL NUT COMPANY,

Respondent.

On Petition for Enforcement of an Order of
the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.),* for enforcement of its order (R. 57-59), [1] issued on May 10, 1967, against Continental Nut Company (hereafter called "Continental" or "the Company").

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* The relevant statutory provisions are set forth in an Appendix, *infra.*

[1] References designated "R" are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

The Board's decision and order are reported at 164 NLRB No. 72. As the Board's order is based in part on findings made in a representation proceeding under Section 9 of the Act, the record in the representation proceeding is part of the record before the Court pursuant to Section 9(d). This Court has jurisdiction of the proceedings, the unfair labor practices having occurred at Chico, California, where the Company is engaged in the processing and sale of nuts.

I. The Board's Findings of Fact

The Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union [2] which had been certified by the Board, following a consent election, as bargaining agent for an appropriate unit of the Company's employees. [3]

Continental admits that it refused to bargain with the certified Union, but contends that the certification is invalid because the Board's Regional Director improperly found that the Union's promise to reduce initiation fees for all employees if it won the election, and its further statement that initiation fees had been reduced in the past when a large group of employees had joined the Union at the same time, did not constitute grounds for setting aside the Board election.

In the unfair labor practice proceeding, the Board refused to consider the merits of the Regional Director's conclusion on the ground that, under the consent election agreement, the Regional Director's findings are final and binding unless they

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[2] Warehousemen's Union Local 17, International Longshoremen's and Warehousemen's Union.

[3] The unit certified was "all production and maintenance employee of the [Company] at its processing plant at Chico, California, including warehousemen, but excluding office clerical employees, salesmen, guards, and supervisors as defined in the Act."

are arbitrary or capricious, neither of which the Company alleged or offered to prove in the unfair labor practice proceeding. The facts are as follows:

A. The representation proceeding

On September 12, 1966, Continental and the Union executed, and the Regional Director approved, an Agreement for Consent Election in a unit of production and maintenance employees (R 53; 5-6). The consent election agreement provided, *inter alia,* that the Regional Director's determination of all questions relating to the election and the manner in which it was conducted "shall be final and binding" (R 54; 5-6). [4]

A representation election was conducted on October 28, 1966, after which the parties certified that the balloting was fairly conducted (R 53; 7). The tally of ballots showed that of 174 eligible voters, 90 ballots were cast for and 71 against the Union, with two challenged ballots (R. 7). On November 4, the Company filed timely objections to conduct allegedly affecting the results of the election and requested that the election be set aside (R 53; 8). Its only objection was that the Union had promised numerous employees that membership initiation fees would be waived if the Union were to win the election. Following a full investigation, the Regional Director issued his Report on Objections on December 1, 1966, in which he overruled the Company's objection (R 53, 54; 9-11). In his Report, the Regional Director found that the Union had told employees that the initiation fees for all employees would be reduced if the Union won the election. He further found that at two pre-election meetings the Union, in response to inquiries, told employees that initiation fees had been reduced in the past when a large group of employees had joined the Union at the same time. The Regional Director concluded that the

[4] The full text of the relevant provisions of the Consent Election Agreement is set forth *infra,* pp. 6-7.

foregoing promises were not objectionable because the employees understood that any reduction in the initiation fee would apply to all employees as a group and would not be contingent on how individual employees voted in the election. Accordingly, he overruled the Company's contentions and certified the Union *(ibid).* [5]

On December 19, 1966, the Union requested that Continental meet with it for the purpose of negotiating a collective bargaining agreement; but, by letter dated December 28, 1966, the latter refused to do so on the ground that it did not believe that the election reflected the free choice of its employees and that the certification was therefore invalid (R 53; 36-37).

B. The unfair labor practice proceeding

Pursuant to a charge filed by the Union (R. 12), the Regional Director issued a complaint on February 2, 1967, [6] alleging that Continental had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by refusing to bargain with the certified representative of its employees (R 52; 13-16). On February 13, the Company filed its answer denying the commission of the unfair labor practices alleged (R 52; 19-22). The General Counsel filed a motion for summary judgment with the Board on March 2, asserting that there were no issues of fact or law requiring a hearing in view of admissions contained in the Company's answer, and praying the issuance of a Decision and Order finding the violations as alleged in the Complaint (R 52-53; 30-35). On March 7, the Board issued an order transferring the proceeding to the Board and a notice to show cause why the General

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[5] The Company filed no exceptions to the Report on Objections and Certification of Representative.

[6] All dates hereafter refer to 1967 unless otherwise specified.

Counsel's motion for summary judgment should not be granted (R 53; 43). The Company's answer of March 23 defended the refusal to bargain on the ground that the Regional Director had erred in failing to sustain its objections to the election (R 53; 50-51).

The Board refused to pass upon the merits of the Regional Director's decision, noting that the Company had agreed to be bound by his findings and conclusions on objections to the election. In the absence of any allegation and proof that the Regional Director's determinations were arbitrary or capricious, the Board found that there were no issues of fact or law requiring a hearing and therefore granted the motion for summary judgment (R 54).

II. The Board's Conclusions and Order

The Board found that the Union's certification was valid and that Continental, having admittedly refused to honor the certification, had violated Section 8(a)(5) and (1) of the Act (R 56, 57).

The Board ordered Continental to cease and desist from refusing to bargain collectively with the Union and from interfering with, restraining or coercing its employees in the exercise of their Section 7 rights in any like or related manner. Affirmatively, the Board ordered Continental to bargain collectively with the Union upon request and to post appropriate notices (R 57-58).

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT CONTINENTAL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE CERTIFIED REPRESENTATIVE OF ITS EMPLOYEES

As the record shows, the Union was certified as the exclusive bargaining representative of Continental's production and maintenance employees as a result of a secret ballot election held

pursuant to the consent election agreement entered into by the parties. Despite requests by the Union to bargain, Continental has at no time honored the certification, taking the position that it was improperly issued and therefore invalid. We show below that the Company's attack on the Board's certification of the Union is without merit, and that its refusal to bargain was thus violative of Section 8(a)(5) and (1) of the Act.

This case "pivots on the agreement for consent election." *N.L.R.B. v. Parkhurst Manufacturing Co.*, 317 F. 2d 513, 516 (C.A. 8). The language of that agreement is explicit and unambiguous. It expressly provides, in relevant part, as follows (R. 5, emphasis supplied):

> 1. SECRET BALLOT . . . Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board, *provided that the determinations of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election . . .*
>
> 6. OBJECTIONS, CHALLENGES, REPORTS THEREON - - Objections to the conduct of the election or conduct affecting the results of the election, or to a determination based on the results thereof, may be filed with the Regional Director within 5 days after the issuance of the Tally of Ballots . . . The Regional Director shall investigate the matters contained in the objections and issue a report thereon . . . *The method of investigation of objections and challenges, including the question whether a hearing*

should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding.

The law is well settled that where, as here, the parties to a consent election agreement provide that the Regional Director's determination on all election matters shall be "final and binding", the Regional Director's disposition of objections cannot be overturned in the absence of "a showing that they are arbitrary or capricious or not in conformity with National Labor Relations Board policies or the provisions of the Act." *N.L.R.B. v. Hood Corporation,* 346 F. 2d 1020, 1022-1023 (C.A. 9). Accord: *N.L.R.B. v. Cadillac Steel Products Corp.,* 355 F. 2d 191, 192 (C.A. 9); *N.L.R.B. v. Sumner Sand & Gravel Co.,* 293 F. 2d 754, 755 (C.A. 9); *N.L.R.B. v. Carlton Wood Products Co.,* 201 F. 2d 863, 867 (C.A. 9); *N.L.R.B. v. Parkhurst Manufacturing Co., supra; Manning, Maxwell & Moore, Inc. v. N.L.R.B.,* 324 F. 2d 857, 858 (C.A. 5); *N.L.R.B. v. Jas. H. Matthews & Co.,* 342 F. 2d 129, 131-132 (C.A. 3), cert. denied, 382 U.S. 832.[7] The Company urges that the Board's (*i.e.,* the Regional Director's) conclusions with respect to the objections were erroneous. Even assuming that this allegation of error could be sustained, it is settled law that "to prove arbitrary or capricious action on the part of the Regional Director, more than error or

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[7] The purpose of "plac [ing] a restrictive limitation upon [a court's] power to review" the Regional Director's disposition of such objections [*N.L.R.B. v. J.W. Rex Co.,* 243 F. 2d 356, 358 (C.A. 3)] is to provide for the prompt and final settlement of disputes concerning the conduct of representation elections and thus to avoid or reduce delay, which is likewise the policy underlying consent election agreements. See, e.g., *Semi-Steel Casting Co. v. N.L.R.B.,* 160 F. 2d 388, 391 (C.A. 8), cert. denied, 332 U.S. 758; *N.L.R.B. v. Capitol Greyhound Lines,* 140 F. 2d 754, 758 (C.A. 6), cert. denied, 322 U.S. 763.

honest mistake must be demonstrated." *N.L.R.B. v. Hood Corporation, supra.* Accord: *N.L.R.B. v. J.W. Rex Co., supra; Elm City Broadcasting Corp., v. N.L.R.B.,* 228 F. 2d 483, 486 (C.A. 2); *N.L.R.B. v. Volney Felt Mills,* 210 F. 2d 559, 560 (C.A. 6).

The Company contends, however, that the consent election agreement only entitles the Regional Director to make final and binding determinations as to any question of fact or procedure, but not as to matters involving legal interpretation. That contention is without merit. First, the express language of the agreement provides that "the determination of the Regional Director shall be final and binding upon *any question . . . relating in any manner to the election . . .*" Clearly, the effect upon the employees of the Union's offer to reduce initiation fees directly relates to whether a free election has been held, which in turn relates "in any manner to the election." The courts have so held in virtually identical cases where the election results have been challenged on the basis of allegedly false and misleading union statements. *N.L.R.B. v. Jas. H. Matthews & Co., supra; N.L.R.B. v. General Armature & Mfg. Co.,* 192 F. 2d 316 (C.A. 3), cert. denied, 343 U.S. 957. Second, the Company's reliance upon this Court's statement in *N.L.R.B. v. Hood Corporation,* (346 F. 2d 1020, 1022) that the Regional Director may make final and binding determinations on "procedural and substantive" questions is misplaced. The Company interprets "substantive" to mean "factual" rather than "legal" questions, and asserts that this means that the Regional Director may not make binding determinations of law. However, its is clear that "substantive" as opposed to "procedural" questions encompass both fact and law. Thus, *Black's Law Dictionary,* Fourth Edition, pp. 1367-1368, defines "procedure" as "the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right . . . This term is commonly opposed to the sum of legal principles constituting the substance of the law . . ." See,

for example, *Manning Maxwell & Moore, Inc. v. N.L.R.B., supra,* where the Regional Director's determination that certain conduct did not, as a matter of law, create an atmosphere of fear and reprisal such as to render a free election impossible, was upheld by the Fifth Circuit. The Regional Director had made the ruling pursuant to a consent election agreement similar to the one here, and the Court gave effect to that agreement: " . . .where a consent agreement to an election makes the determination of the Regional Director final and binding, such a determination is conclusive unless he acts arbitrarily or capriciously, or out of line with Board policy or the Act's requirement; and assertions of mere error are not sufficient" (324 F. 2d at 858).

Moreover, even an allegation of error cannot be sustained, for the Regional Director's conclusions were in harmony with established Board policy and with judicial precedent. As noted above, the Regional Director found that the Union told employees that the initiation fees for *all* employees would be reduced if it won the forthcoming election, and that initiation fees had been reduced in the past when a large group of employees joined the Union at the same time. He also found that the employees understood that any reduction of the initiation fee would apply to all employees as a group and would not be contingent on how individual employees voted in the election. The Board has held, as the Regional Director did here, that the foregoing circumstances do not constitute an interference with a free election and thus do not warrant setting an election aside. *Weyerhaeuser Co.,* 146 NLRB 1, 5; *Gilmore Industries, Inc.,* 140 NLRB 100, reaffirmed 142 NLRB 781. [8] The courts have reached the same conclusion. Thus,

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[8] Under Board law as it existed at the time the election in this case was conducted (October 1966), a pre-election offer of a waiver of initiation fees would be invalid only if it were made contingent upon how the employees voted in the election, *Lobue Bros.,* 109 NLRB 1182, 1183;

(footnote cont'd page 10)

in *Macomb Pottery Co. v. N.L.R.B.*, 376 F. 2d 450, 455, the Seventh Circuit rejected an employer's contention that the election was invalidated because the waiver of fees was to apply only "when the contract is signed" and was thus conditioned upon the union's winning the election. The Court said, in part:

> [W]e agree with the Board that the important consideration is that the promise was not conditioned on the vote or support of the individual employee. If the union won and a 'contract is signed,' the employee who voted against the union would have the same benefit (i.e., waiver of fee) as the employee who voted for the union.

Similarly, in *N.L.R.B. v. Gorbea, Perez & Morell, S. en C.*, 328 F. 2d 679, 682, the First Circuit

> . . . fully agree[d] with the Board that a pre-election promise permitting all present employees, whether they vote[d] for the union or not, to join without payment of an initiation fee up to and *within a reasonable time immediately after*

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8 (Cont'd from preceding page)
and see the *Weyerhaeuser and Gilmore Industries* cases, *supra*. In April 1967, the Board overruled *Lobue Bros.* and held that waivers of initiation fees, whether contingent upon the results of the election or not, would no longer constitute a basis for setting aside an election. *Dit-MCO, Inc.*, 163 NLRB No. 147, 64 LRRM 1476, 1477-1478. This case was decided, however, under *Lobue Bros.*, as reflected in the accompanying text.

> *the election* would not be an [unlawful] inducement. *Gilmore Industries, Inc.*, 140 NLRB 100. (Emphasis added). [9]

See also, *Amalgamated Clothing Workers of America v. N.L.R.B.*, 345 F. 2d 264, 268 (C.A. 2) [no impropriety in a waiver of fees for all who joined the union before a contract was signed].[10] Based upon the foregoing, we contend that the Regional Director's decision was correct.

However, as previously demonstrated, the propriety of the Regional Director's decision is not in issue before this Court. If his conclusion was not "arbitrary or capricious", the Company cannot prevail here. The foregoing discussion of the law manifestly indicates that, judged by the foregoing standard, the Regional Director's refusal to set aside the election, even if erroneous, should not be disturbed.

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[9] What the Court in *Gorbea* found objectionable was the union's positive misrepresentation that the "regular" initiation fee would be waived for those joining right away, although the union did not levy a "regular" initiation fee at all. Such conduct was not involved in the instant case.

[10] Although the Sixth Circuit apparently has held otherwise, *N.L.R.B. v. Gilmore Industries, Inc.*, 341 F. 2d 240, we submit that the weight of authority and reason favor the Board's position.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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January 1968

National Labor Relations Board.

CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * * *

REPRESENTATIVES AND ELECTIONS

* * * * * * *

[Sec. 9] (d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * * *

[Sec. 10] (e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure

or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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